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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 512

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF HERNANDO, STATE OF FLORIDA, A BODY CORPORATE UNDER THE LAWS OF THE STATE OF FLORIDA,

Petitioner,

vs.

W. J. MEREDITH, JAMES G. MARTIN, AND A. R. OHMART.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

O. K. REAVES,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Board of Public Instruction for the County of Hernando, State of Florida, a body corporate under the Laws of the State of Florida, prays that a writ of certiorari issue to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered on May 15, 1941, and to review a preceding inter-

locutory judgment entered in the same cause on June 25, 1940.*

In support of this petition your petitioner shows:

Summary Statement of Matters Involved.

1. In this case two appeals have been decided by the Circuit Court of Appeals for the Fifth Circuit: The first in Case No. 9461, and the last in Case No. 9803. The first reversed a decision in favor of petitioner and remanded the cause for further proceedings; the last affirmed a judgment entered against petitioner. Both records are before the Court. The first decision did not make a final disposition of the case and is now subject to review by certiorari. It involved and held valid bonds which are identical to other bonds held void by the Florida courts.

In the complaint (declaration under Florida practice then in effect) respondents averred that in accordance with Chapter 10655, Laws of Florida, 1925, petitioner on June 1, 1925, for the purpose of borrowing money with which to buy a site and erect a high school building thereon, had issued, under its seal and signatures of its officers, and sold seventy-five bonds in the sum of $1,000 each; that said bonds had been validated and a certificate of such validation affixed upon each bond, a copy of one of the bonds being exhibited; that attached to them were interest coupons for $30 each, maturing June 1 and December 1 of each year, until the bonds matured thirty years hence, executed with facsimile signatures, and payable to bearer, copy of one being exhibited; that respondents were the owners, for value and without notice, of 715 of such coupons clipped from bonds No. 1 to 25 and from 36 to 75, none of which had been paid (R. 9461, pp. 1 to 9).

* While this volume seems ponderous, the reason largely is the number of lengthy appendices.

Petitioner challenged by both demurrer and answer the validity of the bonds and the statute under which they were issued as violating Sections 8, 9 and 17, Article 12 of the Florida Constitution (R. 9461, pp. 10-15).

A stipulation was filed by counsel bringing forward certain facts not shown by the pleadings but to be considered with them, namely, that prior to passage of the Act, under which the bonds issued, Hernando County, pursuant to law, had been divided into eight special tax school districts, and all the territory of the county was in one or the other of these districts (the importance of which will appear in the argument); that it was necessary if the school were built, that it be built in one or the other of said districts; that the proceedings under which the county had been thus divided were matters of public record in the county; that the school was actually built in Brooksville, District No. 1; that such building had since it was built housed the only high school in the county, and was attended by pupils residing anywhere in the county; that prior to its erection there was in Brooksville, built by District No. 1, a high school building, which housed the only high school in the county, attended by pupils residing anywhere in the county; that transportation had been furnished by the county to both, the expense of which was paid from the school fund (R. 9641, pp. 16-19).

The District Judge held the bonds void, sustained petitioner's demurrer and entered final judgment against respondents (R. 9461, p. 18). They appealed, and the Circuit Court of Appeals held the bonds valid, reversed the judgment and remanded the cause for further proceedings (R. 9461, p. 28).

It is appropriate to observe the setting out of which the question, whether the bonds are valid, arises. Article 12 of the Florida Constitution consisting of seventeen sections provides a comprehensive plan for the establishment and

operation of public free schools in the several counties of the State. We have copied it in full as Appendix "A" to this brief. Section 8 requires each county to assess, for the *support* of the schools, a tax of not less than three nor more than ten mills on all taxable property. Section 9 provides that the tax required under Section 8 and other funds mentioned in Section 9 shall constitute the county school fund, and shall be disbursed by the County Board of Instruction "solely for the support and maintenance of public free schools." Section 10 provides that the Legislature may provide for division of the several counties into convenient school districts and for officers of such districts "who shall have the supervision of all the schools within the district"; and for levying a district school tax for the exclusive use of "public free schools within the district." Section 11 provides that any incorporated city or town may constitute a district and that the tax authorized in Section 10 may be expended in the district where levied "for building or repairing school houses." Section 17 authorizes the Legislature to provide that special tax school districts may issue bonds for the "exclusive use of public free schools in the District." The Legislature provided for the formation of such districts, Section 700, *et seq.*, Compiled General Laws of Florida, 1927, and Hernando County was so divided (stipulation R. 9461, p. 16).

Thus school districts may levy taxes and issue bonds and use the funds to build and repair school buildings. But the county wide tax provided for by Section 8 is required to be disbursed for *support and maintenance* of the schools. The phrase "support and maintenance" means current expense of the schools, and excludes buying new sites and erecting new school buildings.

The Statute (Appendix "B") purports to authorize issuance of the bonds for the purpose of buying a site and erecting a high school building (Section 1) and intercep-

tion of the support and maintenance tax required by Section 8 for payment of such bonds (Section 5). If valid, it will keep the taxes raised by Section 8 for support and maintenance of the schools from going into the school fund as required by Section 9, and require same to be used to pay bonds and interest coupons, thus preventing same from being disbursed for support and maintenance of the schools.

Only a short time before the first decision of the Circuit Court of Appeals, the Supreme Court of Florida passed upon identical bonds under an identical Statute, *State ex rel. Vickery* v. *Mowat,* 193 So. 751, see Appendix "C" for proceedings and Appendix "D" for statute therein. The lower State Court had held the bonds void and this was affirmed by evenly divided court. The Florida Court consisted of six Justices, three of whom said that the contention that the bonds were invalid was sustained by the decisions of that Court, but under the circumstances they were unwilling to hold them void, it not appearing that to pay them would materially interfere with operating the public schools (see opinion, Appendix "C", p. 53). The other three dissented from this view and voted to affirm the judgment of the lower court holding the bonds void.

After remand, petitioner filed further defenses, (1) denying the genuineness of the coupons or that they were clipped from the bonds issued by it, and (2) alleging that if the taxes were diverted to the payment of the bonds and interest coupons, it would prevent the operation of the schools (R. 9803, pp. 11, 12). On motion of respondents for summary judgment (R. 9803, p. 17) the District Court, holding there was no genuine issue as to any material fact, entered final judgment against petitioner, payable from the tax required by Section 8, Florida Constitution (R. 9803, p. 22). Petitioner appealed (R. 9803, p. 26), but the judgment was affirmed by the Circuit Court of Appeals on May 15, 1941 (R. 9803, p. 39).

Questions Presented.

1. It appearing that, in the *Mowat* case just above mentioned, a Circuit Court in Florida had held identical bonds invalid and that the Supreme Court of Florida had affirmed the judgment by an evenly divided court, whose personnel had not changed, and there being no evidence that any member of the said Court had changed his views on the question, should not the Circuit Court of Appeals have affirmed the judgment of the District Court holding the bonds invalid? There are two reasons why it should have: First, it would have produced the same results in the State and Federal court; second, the judgment of the State Circuit Court, evenly affirmed, was a binding source of State law, absent a Supreme Court decision, *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176, and absent evidence that the law of the State is otherwise. *Six Companies* v. *Joint Highway Dist. No. 13*, 311 U. S. 180, 61 S. Ct. 186, 85 L. Ed. 159.

2. Are not the bonds void under the Florida decisions, and was not the Circuit Court of Appeals required to affirm the District Court judgment holding them invalid? Any right of the bondholders to assert a claim or lien against the school building is not involved. The question of validity of the bonds is clearly drawn by comparison of the statute with applicable constitutional provisions.

The Constitution, Sections 8 and 9, Article 12, require each county to levy a tax and require the proceeds thereof to be disbursed for the "support and maintenance" of its public free schools. The statute purporting to authorize the bonds here involved prescribes that these tax funds shall be used for another purpose, namely, to pay bonds, and interest on them, issued to build a school building—not support and maintenance at all. For discussion and authorities see point two of brief.

3. When a genuine factual issue was presented by the answer of petitioner—namely, the genuineness of the coupons—was it proper on motion for summary judgment, under Rule 56, to receive an affidavit to meet the issue tendered and enter judgment thereon against petitioner, there being no claim that such factual issue was not tendered in good faith, and there being no counter-affidavit tendered by petitioner.

This is an important question of procedure under the New Federal Rules and has direct bearing upon whether the fundamental rights of trial and cross-examination are to be preserved.

Opinions of Lower Court.

The District Court filed no opinion in either case. The first opinion of the Circuit Court of Appeals (*Meredith* v. *Board,* 112 F. (2d) 914) was filed June 25, 1940 (R. 9461, p. 24); the second (*Board* v. *Meredith,* 119 F. (2d) 712) was filed May 15, 1941 (R. 9803, p. 36). Judgment of affirmance was entered in the last appeal on May 15, 1941 (R. 9803, p. 39).

In its first opinion the Circuit Court of Appeals held that it was bound by the Florida Supreme Court decisions, but that the exact question presented had not been decided by that court; hence that it would apply the law as it understood it. It referred to *State ex rel. Vickery* v. *Mowat,* 193 So. (Fla.) 751, where the validity of bonds issued under identical statute was passed on by the Florida court, and said that case did not settle the question because the Florida court was composed of six Justices, evenly divided. By the proceedings in that case (Appendix "C") it clearly appears that the opinion of all six Justices was that the bonds were invalid, but three of them thought that regardless of the invalidity of the bonds the board should not be permitted to defend against them, absent a showing that

to pay them would interfere with operating the schools, while the other three voted to affirm the lower court judgment holding them void.

The court then referred to *Warren* v. *Board of Public Instruction,* 97 So. 384, decided many years ago, in which no opinion was written by the Florida court, and held that it decided the broad issue presented, because it was said that in the *Warren* case the Florida court held valid a bond issue by a similar body for the purpose of building an addition to a then existing county high school building, and furnishing it, which were capital expenditures, and that the distinction between building an enlargement to an existing building and erecting a new one was negligible. The Florida court has several times in later opinions referred to the *Warren* case, interpreting it contrary to the interpretation placed on it by the court. It also held that the absence of power to issue bonds for the stated purposes was an implied constitutional limitation established by the Florida court, if at all, after the bonds before it were issued, and that under the circumstances it required more than an implied constitutional exclusion to justify it in holding the bonds invalid.

On the second appeal the court said it had already upheld the bonds as valid and nothing remained to be shown except that the coupons were actually clipped from the genuine bonds, denied by petitioner, and that even though the coupons bore no signatures which would enable petitioner to identify them as its obligation, it was in keeping with the letter and spirit of Rule 56 that such issue could be met and decided upon *ex parte* affidavits, if not offset by opposing affidavits.

In a previous decision, *City of Hialeah* v. *Groves,* 101 F. (2d) 951, the court had held, under the Florida law, that when the City denied that the coupons sued on were executed by it or were detached from bonds executed by it,

the plaintiff must prove they were, and it was error to enter judgment without proof. Under the last decision in the present litigation the court held that affidavits may be used as such proof.

Jurisdiction.

The final judgment of the Circuit Court of Appeals now sought to be reviewed was entered May 15, 1941 (R. 9803, p. 39). The previous interlocutory decision of the Circuit Court of Appeals was rendered on June 25, 1940 (R. 9461, p. 28). This decision is subject to review on certiorari after final judgment was entered, *Hamilton-Brown Shoe Company* v. *Wolf Brothers & Co.*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629.

Jurisdiction of this Court to review on certiorari exists under Section 240(a), Judicial Code; Section 347, Title 28, U. S. Code Annotated.

Reasons Relied Upon for Writ.

1. The Circuit Court of Appeals disregarded binding sources of State law, and its decision produces the anomalous result that the bonds are valid in the Federal Court, and void in the State Court, contrary to the mandates of this Court in *Erie R. Co.* v. *Tompkins,* and subsequent cases.

2. The decision by the Circuit Court of Appeals that funds appropriated by the constitution law to the support and maintenance of public schools may be impaired and invaded by statute for the purpose of buying sites and building schools is in conflict with the law of Florida, as well as with the great weight of authority upon the question.

3. The decision of the Circuit Court of Appeals on the last appeal that *ex parte* affidavits may be submitted as

proof of material facts on motion for summary judgment is untenable, is in conflict with the letter and spirit of Rule 56, Civil Rules of Procedure, and is in conflict with the case law so far decided interpreting said rule. The ultimate effect of such holding is to invade the right of trial and of cross-examination.

WHEREFORE, your petitioner prays that writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court as authorized by the Statutes of the United States, and that the judgments herein of the Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated at Tampa, Florida, this the 31 day of July, A. D. 1941.

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